

FEDERAL CIRCUIT COURT OF AUSTRALIA

MOHAMUD v MINISTER FOR IMMIGRATION & ANOR [2019] FCCA 1538

Catchwords:

MIGRATION – Judicial review – decision of Administrative Appeals Tribunal – refusal of partner visa – whether failure to consider materials – whether irrelevant considerations taken into account – whether decision fair – whether errors in interpretation – whether third party fraud on Tribunal by migration agent – whether jurisdictional error.

WORDS AND PHRASES – “unknown”.

Legislation:

Evidence Act 1995 (Cth), ss.56, 140

Migration Act 1958 (Cth), Pt.7 Div.4, ss.5F, 359AA, 360, 361, 476

Migration Regulations 1994 (Cth), regs.1.15A, Sch.2, cls.801.221, 820.211, 820.221

Convention on the Rights of the Child (1989) 1577 UNTS 3; 28 ILM 1456; [1991] ATS 4

Cases cited:

AMF15 v Minister for Immigration & Border Protection & Ors [2016] FCAFC 68, (2016) 241 FCR 30; (2016) 338 ALR 551

Aon Risk Services Australia Limited v Australian National University [2009] HCA 27; (2009) 239 CLR 175; (2009) 83 ALJR 951; (2009) 258 ALR 14

Briginshaw v Briginshaw & Anor (1938) 60 CLR 336; [1938] ALR 334; (1938) 12 ALJ 100

Commonwealth & Anor v Fernando [2012] FCAFC 18; (2012) 200 FCR 1; (2012) 287 ALR 267; (2012) 126 ALD 10

Craig v The State of South Australia (1995) 184 CLR 163; (1995) 82 A Crim R 359; (1995) 69 ALJR 873; (1995) 131 ALR 595; (1995) 39 ALD 193

DQQ17 v Minister for Immigration & Border Protection [2018] FCA 784

El Saghir v Minister for Immigration & Border Protection [2016] FCA 1430

Lee v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 464

Mazhar v Minister for Immigration & Multicultural Affairs [2000] FCA 1759; (2000) 183 ALR 188; (2000) 64 ALD 395

Minister for Immigration & Citizenship v Khadgi & Anor [2010] FCAFC 145; (2010) 190 FCR 248; (2010) 274 ALR 438; (2010) 119 ALD 26

Minister for Immigration & Citizenship v Li & Anor [2013] HCA 18; (2013) 249 CLR 332; (2013) 87 ALJR 618; (2013) 297 ALR 225; (2013) 138 ALD

Minister for Immigration & Citizenship v SZIAI [2009] HCA 39; (2009) 83 ALJR 1123; (2009) 259 ALR 429; (2009) 111 ALD 15

Minister for Immigration & Citizenship v SZLIX [2008] FCAFC 17; (2008) 245 ALR 501; (2008) 100 ALD 443

Minister for Immigration & Citizenship v SZNVW [2010] FCAFC 41; (2010) 183 FCR 575; (2010) 114 ALD 666

Minister for Immigration & Ethnic Affairs v Wu Shan Liang & Ors (1996) 185 CLR 259; (1996) 70 ALJR 568; (1996) 136 ALR 481; (1996) 41 ALD 1

Minister for Immigration & Multicultural & Indigenous Affairs v SGLB [2004] HCA 32; (2004) 78 ALJR 992; (2004) 207 ALR 12; (2004) 78 ALD 224

Minister for Immigration & Multicultural Affairs v Indatissa [2001] FCA 181; (2001) 64 ALD 1

Minister for Immigration & Multicultural Affairs v Yusuf [2001] HCA 30; (2001) 206 CLR 323; (2001) 75 ALJR 1105; (2001) 180 ALR 1; (2001) 62 ALD 225

MZAIB v Minister for Immigration & Border Protection & Anor [2015] FCA 1392; (2015) 238 FCR 158

MZXLD v Minister for Immigration & Citizenship [2007] FCA 1912

Nduta v Minister for Immigration & Border Protection [2016] FCA 1596

Nguyen v Minister for Immigration & Multicultural Affairs [2000] FCA 1265; (2000) 101 FCR 20; (2000) 31 AAR 448

Perera v Minister for Immigration & Multicultural Affairs [1999] FCA 507; (1999) 92 FCR 6; (1999) 56 ALD 231

Plaintiff S157/2002 v The Commonwealth of Australia [2003] HCA 2; (2003) 211 CLR 476; (2003) 77 ALJR 454; (2003) 195 ALR 24; (2003) 72 ALD 1

Re Minister for Immigration & Multicultural Affairs; Ex parte Holland [2001] HCA 76; (2001) 185 ALR 504

Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Lam [2003] HCA 6; (2003) 214 CLR 1; (2003) 77 ALJR 699; (2003) 195 ALR 502; (2003) 72 ALD 613

Singh v Minister for Immigration & Border Protection [2017] FCA 1298; (2017) 159 ALD 442

Snedden v Minister for Justice & Anor [2014] FCAFC 156; (2014) 230 FCR 82; (2014) 315 ALR 352; (2014) 145 ALD 273

Sullivan v Department of Transport (1978) 20 ALR 323; (1978) 1 ALD 383

Sun v Minister for Immigration & Border Protection [2017] FCA 1270; (2017) 157 ALD 437

SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs [2006] HCA 63; (2006) 228 CLR 152; (2006) 81 ALJR 515; (2006) 231 ALR 592; (2006) 93 ALD 300

SZFDE & Ors v Minister for Immigration & Citizenship & Anor [2007] HCA 35; (2007) 232 CLR 189; (2007) 81 ALJR 1401; (2007) 237 ALR 64; (2007) 96 ALD 510

SZFNX v Minister for Immigration & Citizenship [2007] FCA 1980

SZHTI v Minister for Immigration & Multicultural & Indigenous Affairs [2006]

FCA 702

SZJMG v Minister for Immigration & Citizenship [2008] FCA 1145

SZRMQ v Minister for Immigration & Border Protection & Anor [2013]

FCAFC 142; (2013) 219 FCR 212; (2013) 139 ALD 436

SZRUR v Minister for Immigration & Border Protection & Anor [2013]

FCAFC 146; (2013) 216 FCR 445; (2013) 305 ALR 557; (2013) 138 ALD 46

WZASX v Minister for Immigration & Border Protection [2017] FCA 1415

WZASY v Minister for Immigration & Anor [2017] FCCA 1623

WZATI v Minister for Immigration & Border Protection [2015] FCA 923

WZAVW v Minister for Immigration & Border Protection [2016] FCA 760

Zentai v O'Connor & Ors (No 3) [2010] FCA 691; (2010) 187 FCR 495;

(2010) 270 ALR 293; (2010) 116 ALD 476

The Shorter Oxford English Dictionary on Historical Principles (3rd Edn)
(Oxford: Clarendon Press, 1992)

Applicant: ABDULKADIR AHMED MOHAMUD

First Respondent: MINISTER FOR IMMIGRATION &
BORDER PROTECTION

Second Respondent: ADMINISTRATIVE APPEALS
TRIBUNAL

File Number: PEG 345 of 2017

Judgment of: Judge Antoni Lucev

Hearing date: 8 December 2017

Date of Last Submission: 8 December 2017

Delivered at: Perth

Delivered on: 12 June 2019

REPRESENTATION

For the Applicant:	In person (with the assistance of an interpreter)
Counsel for the First Respondent:	Mr A Burgess
Counsel for the Second Respondent:	Submitting appearance save as to costs
Solicitors for the Respondents:	Sparke Helmore

ORDERS

- (1) The application be dismissed.
- (i)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT PERTH

PEG 345 of 2017

ABDULKADIR AHMED MOHAMUD

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicant seeks judicial review (“Judicial Review Application”) under s.476 of the *Migration Act 1958* (Cth) (“*Migration Act*”) of a decision of the Administrative Appeals Tribunal (“Tribunal Decision” and “Tribunal” respectively) made on 31 May 2017. The Tribunal Decision affirmed a decision of a delegate (“Delegate’s Decision” and “Delegate” respectively) of the first respondent, the Minister for Immigration & Border Protection (“Minister”) affirming the Delegate’s Decision to not grant the applicant a Partner (Temporary) (Class UK) (Subclass 820) visa or Partner (Residence) (Class BS) (Subclass 801) visa (“Combined Partner Visa”).

2. The Tribunal Decision appears at Court Book (“CB”) 277-287.

Background

3. The background to the Judicial Review Application is as follows:
- a) the applicant is a citizen of Finland who arrived in Australia in September 2014 and has since resided in Australia: CB 1-22;
 - b) the applicant was in a relationship with Fatuma Mohamud Mohamed (“Ms Mohamed”) whom he married on 11 October 2014: CB 201-202;
 - c) Ms Mohamed was the nominated sponsor for the applicant when the applicant applied for a Combined Partner Visa on 2 December 2014: CB 22;
 - d) on 20 April 2015 the applicant and Ms Mohamed had a son: CB 201;
 - e) the applicant moved out of a residence shared with Ms Mohamed on 18 December 2015, and he notified the Department of Immigration & Border Protection (“Department”) of a change in his address on 13 January 2016: CB 106 and 109;
 - f) the applicant notified the Department of his change in circumstances, namely a breakdown of his relationship with Ms Mohamed on 14 January 2016: CB 117-119;
 - g) on 29 January 2016 Ms Mohamed advised the Department she had recently withdrawn her sponsorship for the applicant, and had become aware false information was provided on his Combined Partner Visa application: CB 108;
 - h) Ms Mohamed, in a sworn statutory declaration dated 29 January 2016 (“Ms Mohamed’s Statutory Declaration”), stated she had become aware on 17 December 2015 that the applicant was in a relationship with another woman (“Other Woman”) and had a three year old child currently residing in London in the United Kingdom (“UK”): CB 109;

- i) on 7 April 2016 a Delegate refused to grant the applicant a Combined Protection Visa, and an appeal to the Administrative Appeals Tribunal was lodged on 16 April 2016: CB 159 and 187; and
- j) while the Tribunal proceedings were on foot, Ms Mohamed was granted an interim restraining order against the applicant, by order of Magistrate Smith in the Magistrates Court of Western Australia on 6 February 2017: CB 253-270.

The Tribunal Decision

- 4. The applicant was invited to attend a Tribunal hearing on 4 April 2017: CB 194 (“Tribunal Hearing”). Prior to the Tribunal Hearing, on 24 January 2017, the applicant’s migration agent provided supporting documents for the Tribunal to consider, and further correspondence from the migration agent on 2 April 2017 attached an outline of submissions and other materials: CB 213-226.
- 5. The Tribunal Hearing scheduled for 4 April 2017 was rescheduled by the Tribunal for 24 April 2017, and it was noted the Tribunal may wish to take evidence from Ms Mohamed and the applicant was to arrange for her to attend the Tribunal Hearing: CB 230-231. The applicant’s response to the Tribunal Hearing invitation indicated Ms Mohamed would not be attending, but requested the Tribunal consider oral evidence from two other witnesses: CB 234-236. The applicant’s migration agent provided the Tribunal with Ms Mohamed’s contact number: CB 239.
- 6. The applicant attended the Tribunal Hearing on 24 April 2017 and was accompanied by his migration agent. Also in attendance were the two other witnesses for the applicant, from whom the Tribunal took oral evidence. The Tribunal considered only the Partner (Temporary) (Class UK) (Subclass 820) visa (“Temporary Partner Visa”), as the Delegate’s Decision stated satisfaction of the criterion of the Temporary Partner Visa is a prerequisite for an application Partner (Residence) (Class BS) (Subclass 801) visa (“Partner Residence Visa”): *Migration Regulations 1994* (Cth) (“*Migration Regulations*”), sch.2 cl.801.221(2) (a).

7. On 31 May 2017 the Tribunal Decision affirmed the Delegate's Decision. In the Tribunal Decision the Tribunal:
- a) identified that the issue in the case was whether the applicant and Ms Mohamed had a mutual commitment to a shared life together to the exclusion of all others when lodging the Combined Partner Visa Application on 2 December 2014: CB 278 at [7];
 - b) referred to the criterion in cls.820.211 and 820.221 of sch.2 to the *Migration Regulations*, and other relevant provisions of the *Migration Act* or *Migration Regulations*: CB 278 at [8]-[9];
 - c) found the applicant and Ms Mohamed were married to each other in the context required by s.5F(2)(a) of the *Migration Act*: CB 279 at [11];
 - d) acknowledged the applicant's claims he had attempted to, and did in fact, financially contribute to the relationship, though the applicant could not prove the alleged financial contribution as he always used cash and did not realise he had to keep receipts, and said that Ms Mohamed wanted to control him and use him as domestic help: CB 279 at [15];
 - e) found the oral evidence of one of the applicant's witnesses that the community raised funds to assist the applicant and Ms Mohamed financially, reflected the finding that there was little evidence of any pooling of financial resources or sharing of day to day household expenses: CB 280 at [18];
 - f) accepted on the basis of the available evidence that the applicant and Ms Mohamed resided under the same roof and shared the household responsibilities during the time they lived together, including care of their son: CB 280 at [23];
 - g) had regard to the content and statements made in the statutory declarations provided in support of the Combined Partner Visa Application ("Original Statutory Declarations"), and four further statutory declarations lodged for the Tribunal to consider in the review of the Delegate's Decision sworn after the relationship ended in February 2016 ("Subsequent Statutory Declarations"),

but noted the Subsequent Statutory Declarations were each identically worded: CB 280 at [25]-[26];

- h) from the evidence provided, including the oral evidence of the witnesses at the Tribunal Hearing, found the applicant and Ms Mohamed presented as a married couple and that others, including their families, the Somali community and members of their Church believed them to be in a genuine and committed relationship: CB 281 at [33];
- i) noted that it had allowed the applicant to consult his representative, when during the Tribunal Hearing, and pursuant to the provisions of s.359AA of the *Migration Act*, information contained in Ms Mohamed's Statutory Declaration was given to the applicant which the Tribunal indicated would be the reason or part of the reason for affirming the Delegate's Decision, and which may lead the Tribunal to:
 - i) conclude that the applicant did not have a mutual commitment to the relationship; and
 - ii) affirm the Delegate's Decision: CB 282 at [47];
- j) was not persuaded by the applicant's responses regarding his failure to declare his other child in the UK, and did not accept Ms Mohamed knew of the relationship given the close correlation between the time the applicant left the shared residence and Ms Mohamed having a conversation with the Other Woman in the UK: CB 284 at [55];
- k) did not believe the applicant's evidence regarding previous relationships, and noted a number of inconsistencies in his evidence concerning those relationships, and found that the applicant's statements made during the Tribunal Hearing were convoluted, evasive and not credible, and dismissed his claim Ms Mohamed completed the Combined Partner Visa application and took responsibility for its content, pointing out that the applicant had signed the application form, and expressly swore as to the truth of its content: CB 283 at [50], 284-285 at [56]-[57] and 285 at [58];

- l) given the Tribunal's concerns as to the applicant's credibility in relation to evidence of past relationships ultimately placed little weight upon claims made by the applicant in relation to those relationships: CB 285 at [59]-[61];
- m) accepted the applicant and Ms Mohamed lived and engaged in social activities together after marrying in 2014, and that the applicant had some involvement with Ms Mohamed's children as they lived in the same household, however, the applicant's relationship with at least one other person at the time he entered into his relationship with Ms Mohamed indicated that he did not have a commitment to the relationship to the exclusion of other partners or see it as being a genuine and continuing relationship: CB 285 at [63]; and
- n) in finding the applicant and Ms Mohamed were not in a "spousal relationship" the Tribunal found at CB 285 at [64] that:

Overall and having regard to the circumstances of this relationship, the Tribunal is not satisfied the applicant and sponsor [Ms Mohamed] have a mutual commitment to a shared life together as husband and wife to the exclusion of all others.

Judicial Review Application

- 8. On 23 June 2017 the applicant lodged the Judicial Review Application and a supporting affidavit annexing a copy of the Tribunal Decision.
- 9. Pursuant to an order made by a Registrar of this Court on 13 September 2017 the applicant was permitted to file any amended Judicial Review Application or further supporting affidavits. The applicant filed an affidavit sworn on 14 November 2017 ("Applicant's Second Affidavit") and another sworn on 24 November 2017 ("Applicant's Third Affidavit"), and written submissions on 24 November and 6 December 2017.
- 10. The three grounds in the Judicial Review Application as filed are as follows:

1 the tribunal failed to consider all the materials.

2. the Tribunal fell into error by irrelevantly considering and relying on the statement of the sponsor

3. I believe the tribunal failed to make a fair decision

11. The Applicant's Second Affidavit restated the factual background to the Judicial Review Application and attempted to dispute the findings in the Tribunal Decision by reference to the applicant's version of events, while also implying that:
 - a) there were errors in the Tribunal Decision due to the applicant's poor language skills and misunderstandings between the applicant and the interpreter: Applicant's Second Affidavit, p.2 at [6] and [9]; and
 - b) the applicant's migration agent "did not explain properly the requested information including the statutory declaration" referring to the applicant's previous relationships and the request to provide evidence of his relationship with Ms Mohamed: Applicant's Second Affidavit, p.2 at [7] and [9].
12. The Court will provisionally treat [11(a) and (b)] above as additional grounds of the Judicial Review Application, namely, grounds 4 and 5, as follows:
 - a) ground 4 – that misinterpretation of the applicant's evidence resulted in a Tribunal Hearing which was procedurally unfair, and therefore a jurisdictional error; and
 - b) ground 5 – that there was a fraud on the Tribunal as a result of the applicant's migration agent failing to properly explain, first, the evidence of Ms Mohamed to the applicant, second, the requirement to provide evidence of his previous relationship, and third, his relationship with Ms Mohamed.
13. As indicated above, the two additional grounds will be provisionally treated as grounds 4 and 5 of the Judicial Review Application. The Court does so on the basis that, particularly in cases where a litigant is in person and does not have English as a first language, and is one who lacks familiarity with the Australian legal system, the Court must be alert to ensure that any possible jurisdictional error is not overlooked:

MZAIB v Minister for Immigration & Border Protection & Anor [2015] FCA 1392; (2015) 238 FCR 158 at [100] and [112] per Mortimer J.

14. Annexed to the Applicant's Second Affidavit were additional materials, namely:
 - a) Annexure A, being a certificate from Finland stating the applicant's marital status was "unknown", which the applicant asserted meant that "there was no Legal marriage registered": Applicant's Second Affidavit at [3]; and
 - b) Annexure B, being three letters by way of character references from a work colleague, the President of a Somali Community Association, and the Imam at a mosque attended by the applicant.
15. The Applicant's Third Affidavit again reiterated the applicant's history with Ms Mohamed and attached a significant number of photographs, principally of the applicant and Ms Mohamed, but in only one of 60 photographs is there a photograph of them actually together.

Applicant's submissions

16. On 24 November 2017 the applicant filed written submissions, which provided as follows:
 1. *I married Fatuma Mohamed in good faith in a legally binding and mutual relationship on the 11th of October, 2014. I lived with my former wife as I had intended to in a loving and nurturing way for 18 months leading up to and following our wedding.*
 2. *I loved her dearly and could not have asked for a better partner but unfortunately our wider family and community played a role in our separation.*
 3. *I was a productive and supportive husband, as she was not driving at the time I would take the kids to school, taught her second eldest how to drive and would help around the house and with family matters as best as possible.*
 4. *My former wife was the sole person who helped me gain a visa and entry into Australia, even picking me up on arrival. During her pregnancy I'd asked to visit my family in Finland*

but she instead insisted that I stay and that she would help me obtain permanent residency as her husband.

5. *Unfortunately, our problems started in October, 2015 and due to our misunderstanding she denied me from seeking work although I advised her that I needed to make an income for the family given her situation as she takes Centrelink payments which were not enough to sustain the household.*
6. *On the 14th of October, 2015 my former wife booked a ticket for me with the intention of sending me off back to Finland as she had the power and funds to do. The Somali community was asked to intervene in the matter and the matter was addressed with reconciliation.*
7. *On the 18th of December, 2015 she again expelled me from the residence and then made contact with the Department of Immigration accusing me of false allegations to sabotage my residence in this country. I initially arrived to Australia for the purpose of marrying Fatuma Mohamed and did not come as a refugee or political asylum seeker.*
8. *I understand that a single-mother with 5 children can be at more risk of stress with life problems and had hoped to lend a helping hand as much as I was able to.*
9. *I wish to live nearby my son and join with him on his journey through life, being able to take part in memorable moments and also being there for him in time of need.*
10. *For evidence of Fatuma Mohamed picking me up at the Airport, please review the CCTV image of 18th June, 2014 and on the 21st, September 2014 at the Perth International Airport. I sincerely request that I am informed about the reason for the denial of my Visa.*
11. *I have never been at fault with the Law and understand that family problems are an everyday occurrence for all families.*
12. *I am a hard working man who pays tax and child support and contributes to society at large and am currently working on a project that will house the elderly in a safe and dignified way. I feel that it would be beneficial for me to stay in this wonderful country in a peaceful and dignified way so that I can be in my son's life. I have family and friends that I have grown fond of and would like to continue my relationships with them.*

13. *I feel that I will be at a disadvantage if I am to return to Finland as I have accustomed myself to the way of life in Australia, learning the language and culture to better integrate and lead a proper and purposeful life.*
 14. *Ayub Abdulkadir Ahmed is my 2-year-old son that I have become very fond of and love dearly.*
 15. *I spent a considerable amount of time with him during his first few months, I see him regularly now and wish to continue my warm hearted relationship with him as his loving and grateful father.*
 16. *I have a court date with the family court regarding my visitation rights with my son and hope the Judge allows me to spend more time with my son.*
 17. *Every son needs a fatherly figure in his life to bond and grow with and I feel like I cannot miss such an opportunity especially in these very few crucial years of his life.*
 18. *I wish to be with him during moments of hardship and joy and cannot wait to join him on his very first day of school and many birthdays to come.*
 19. *If for some reason I am denied a visa, please consider allowing me to stay for the sake of my son for his benefit.*
 20. *I hope that this letter is received with understanding and empathy about my relationship with my son.*
 21. *I hope to continue my lifelong journey with my son and it would absolutely destroy my soul if we were to be parted.*
 22. *I ask in good faith that the Federal Circuit Court of Australia review my plea and afford me the human right of adopting the father figure role in my son's life as every child deserves.*
17. On 6 December 2017 the applicant filed further written submissions, which provided as follows:
1. *At the time of our falling out on the 18/12/2015 I was forced to leave the house by Fatuma Mohamed. Witness to this incident was Mohamoud and his wife Samsam, who are the owners of Juba Halal Meat in Nollamara - his number being ... [number deleted].*

2. *The couple had arrived at the house to sign off timesheets required for their daycare business at the time.*
 3. *The couple tried to intervene in our dispute but upon Fatuma Mohamed's refusal to allow me to return, the couple offered to take me to my cousins house as I had nowhere else to go.*
 4. *My cousin (Hawo Ali) took me in and offered me her residence (... [street address deleted], Morley) for a period of time - her number being ... [number deleted].*
 5. *The following day on the 19/12/2015 a family friend was called to mitigate in our dispute but after much discussion Fatuma Mohamed again refused to resolve the dispute on the basis that it was solely between herself and I.*
 6. *I believe I have presented all available evidence in support of my application and I am willing to assist the Court in any further matters that relate to my application in a transparent and supportive manner.*
18. The applicant's written submissions have no discernible link to, nor do they reference, the grounds of review in the Judicial Review Application.
19. The applicant was provided an opportunity at hearing to make oral submissions, which he did in the following terms:
- a) he is the victim in all of this, he made a mistake and now he is paying for it: Transcript, pages 3-4;
 - b) the Tribunal only took his wife's evidence into account and did not consider his evidence, and he repeatedly asked what more he needed and told the Tribunal who they should call: Transcript, page 5;
 - c) his migration agent and various interpreters did not advise him of what was required or explain to him what the adverse accusations or claims his partner had made and so he did not find evidence to disprove or challenge this: Transcript, page 5;
 - d) he wishes to be with his child and as a father it is his right to be with his child: Transcript, page 6;

- e) he did not have a lawyer, despite having made efforts to obtain one, but they had all turned him down: Transcript, page 6; and
- f) he requested that the Court let him have one more time to attend, in order to enable him to “present my wife, my partner and my child to be in attendance with this court, the three of us and to hear again what she has to say ... this will balance with the evidence that she submitted to the court before and the second evidence that she’s going to submit to the court again next”: Transcript, page 9.

Observations and findings on applicant’s submissions

20. In relation to the applicant’s oral submissions at hearing:

- a) [19(a)] above is not a ground of judicial review;
- b) [19(b)] above relates to ground 2 of the Judicial Review Application;
- c) [19(c)] above relates to grounds 4 and 5 of the Judicial Review Application, as set out at [12] above;
- d) [19(d)] above is apt to be treated as falling under ground 1, on the basis that it appears to be an assertion that the Tribunal failed to consider a relevant consideration or material in relation to the *Convention on the Rights of the Child* (“CROC”) (1989) 1577 UNTS 3; 28 ILM 1456; [1991] ATS 4;
- e) [19(e)] above does not give rise to a ground of jurisdictional error in the Tribunal Decision because it is well accepted there is no right to legal representation in migration proceedings in the federal courts: *Nguyen v Minister for Immigration & Multicultural Affairs* [2000] FCA 1265; (2000) 101 FCR 20; (2000) 31 AAR 448 at [27], [32] and [36] per Sackville, Marshall and Lehane JJ; *SZHTI v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCA 702 at [4] per Gyles J; *WZASY v Minister for Immigration & Anor* [2017] FCCA 1623 at [20]-[21] per Judge Lucev. It is not a requirement of procedural fairness for an applicant to have publically funded legal representation, nor is it a reasonable ground for an application or

proceeding to be stayed because an applicant does not have such representation: *AMF15 v Minister for Immigration & Border Protection & Ors* [2016] FCAFC 68, (2016) 241 FCR 30; (2016) 338 ALR 551 at [51] per Flick, Griffiths and Perry JJ; and

- f) [19(f)] effectively amounted to a request for an adjournment, but no adjournment was granted because the basis for the request was one which amounted to no more than a plea for impermissible merits review of the Tribunal Decision: *Minister for Immigration & Ethnic Affairs v Wu Shan Liang & Ors* (1996) 185 CLR 259; (1996) 70 ALJR 568; (1996) 136 ALR 481; (1996) 41 ALD 1 (“*Wu Shan Liang*”), CLR at 272 per Brennan CJ, Toohey, McHugh and Gummow JJ, and because at that time the presiding Judge had approximately 700 matters in his docket, and less than one month before the hearing the Federal Court had described the workload in the then single Judge Perth Registry of this Court as “extreme”: *WZASX v Minister for Immigration & Border Protection* [2017] FCA 1415 at [32] per McKerracher J. In those circumstances case management considerations weighed against any adjournment of the hearing of the Judicial Review Application which had been filed more than five months previously, and in respect of which the applicant had filed two affidavits and two outlines of submissions, and the Minister had filed the CB and an outline of submissions, and, if which was then adjourned, would have been unlikely to be relisted for hearing for more than two years: *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27; (2009) 239 CLR 175; (2009) 83 ALJR 951; (2009) 258 ALR 14 at [27] per French CJ and [102] per Gummow, Hayne, Crennan, Kiefel and Bell JJ. In those circumstances, no case for an adjournment was made out.

Ministers submissions

21. The Minister objected to the Court receiving the evidence provided in the Applicant’s Second and Third Affidavits, as the evidence therein:
- a) was not before the Tribunal; and

- b) is not relevant to the Court's consideration of whether the Tribunal Decision was affected by jurisdictional error, citing *Craig v The State of South Australia* (1995) 184 CLR 163; (1995) 82 A Crim R 359; (1995) 69 ALJR 873; (1995) 131 ALR 595; (1995) 39 ALD 193, CLR at 179 per Brennan, Deane, Toohey, Gaudron, McHugh JJ.

22. In response to the first three grounds of review the Minister submitted that:

- a) the grounds constitute a request for impermissible merits review based on the applicant's dissatisfaction with the Tribunal Decision;
- b) it is apparent that the Tribunal considered the applicant's evidence, both oral and documentary, and although the Tribunal accepted that many aspects of the relationship pointed to it possibly being genuine, the Tribunal placed more weight on other factors which it found to be “problematic”;
- c) Ms Mohamed’s Statutory Declaration was not an irrelevant consideration in the sense that the Tribunal was forbidden or prohibited from taking it into account;
- d) the evidence that the applicant was in another relationship was directly relevant to the assessment of whether the applicant and Ms Mohamed were in a genuine spousal relationship;
- e) to the extent that the applicant seeks to cavil with the weight the Tribunal gave Ms Mohamed’s Statutory Declaration, the Tribunal’s finding that the applicant and Ms Mohamed were not in a spousal relationship was clearly open to it following its assessment of the evidence, and the weight to be given to that material was a matter for the Tribunal as sole arbiter of the facts; and
- f) it is apparent that the Tribunal put the information contained in Ms Mohamed’s Statutory Declaration to the applicant pursuant to s.359AA of the *Migration Act*: CB 283 at [47]-[48], and discussed with the applicant his relationship with the Other Woman and his second child in the UK: CB 284 at [51]-[55].

23. In relation to ground 4 the Minister submitted that:
- a) no jurisdictional error is identified from that purported ground; and
 - b) the applicant has failed to provide any evidence to establish that any misinterpretation did in fact occur, or further, how any such misinterpretation could have resulted in the Tribunal Hearing being affected by a denial of procedural fairness: *SZRMQ v Minister for Immigration & Border Protection & Anor* [2013] FCAFC 142; (2013) 219 FCR 212; (2013) 139 ALD 436 (“*SZRMQ*”): Transcript, page 8.
24. In relation to ground 5 the Minister submitted that there was no evidence to establish a fraud on the Tribunal by the applicant’s migration agent, and that strong evidence is usually required to establish fraud, and that bad advice, negligence or inadvertence on behalf of the migration agent would not be sufficient to establish a fraud on the Tribunal: citing *SZFDE & Ors v Minister for Immigration & Citizenship & Anor* [2007] HCA 35; (2007) 232 CLR 189; (2007) 81 ALJR 1401; (2007) 237 ALR 64; (2007) 96 ALD 510 (“*SZFDE*”) at [51] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ; *Minister for Immigration & Citizenship v SZLIX* [2008] FCAFC 17; (2008) 245 ALR 501; (2008) 100 ALD 443 (“*SZLIX*”) at [33] per Tamberlin, Finn and Dowsett JJ; Transcript, pages 7-8.

Legislative framework

25. Clause 820.211(2)(a) of sch.2 to the *Migration Regulations*, failure to meet the requirements of which was the basis upon which the applicant was refused his Temporary Partner Visa, reads as follows:

(2) *An applicant meets the requirements of this subclause if:*

(a) *the applicant is the spouse or de facto partner of a person who:*

(i) *is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen; and*

(ii) *is not prohibited by subclause (2B) from being a sponsoring partner; and*

26. Ms Mohamed was not prohibited by cl.820.211(2B) of the *Migration Regulations* from being a sponsoring partner. By reason of cl.820.211(2)(a) of the *Migration Regulations* the applicant therefore had, for the purposes of the Combined Partner Visa application, to satisfy the definition of “spouse” in s.5F of the *Migration Act*, which defines “spouse” as follows:

*(1) For the purposes of this Act, a person is the **spouse** of another person if, under subsection (2), the 2 persons are in a married relationship.*

*(2) For the purposes of subsection (1), persons are in a **married relationship** if:*

(a) they are married to each other under a marriage that is valid for the purposes of this Act; and

(b) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and

(c) the relationship between them is genuine and continuing; and

(d) they:

(i) live together; or

(ii) do not live separately and apart on a permanent basis.

(3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.

27. Regulation 1.15A of the *Migration Regulations* states as follows:

(1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.

(2) If the Minister is considering an application for:

(a) a Partner (Migrant) (Class BC) visa; or

(b) a Partner (Provisional) (Class UF) visa; or

(c) a Partner (Residence) (Class BS) visa; or

(d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

(3) The matters for subregulation (2) are:

(a) the financial aspects of the relationship, including:

(i) any joint ownership of real estate or other major assets; and

(ii) any joint liabilities; and

(iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and

(iv) whether one person in the relationship owes any legal obligation in respect of the other; and

(v) the basis of any sharing of day-to-day household expenses; and

(b) the nature of the household, including:

(i) any joint responsibility for the care and support of children; and

(ii) the living arrangements of the persons; and

(iii) any sharing of the responsibility for housework; and

(c) the social aspects of the relationship, including:

(i) whether the persons represent themselves to other people as being married to each other; and

(ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and

(iii) any basis on which the persons plan and undertake joint social activities; and

(d) *the nature of the persons' commitment to each other, including:*

(i) *the duration of the relationship; and*

(ii) *the length of time during which the persons have lived together; and*

(iii) *the degree of companionship and emotional support that the persons draw from each other; and*

(iv) *whether the persons see the relationship as a long-term one.*

Consideration – admissibility of further materials

28. The Minister objects to the Court receiving:
- a) the three character references annexed to the Applicant's Second Affidavit; and
 - b) the photographs annexed to the Applicant's Third Affidavit.
29. It is a well-established principle that while there is no prohibition on receiving new evidence in judicial review proceedings, ordinarily the Court should exercise "resistance to the admission of fresh evidence": *MZXLD v Minister for Immigration & Citizenship* [2007] FCA 1912 at [10] per Gordon J, and particularly so where:
- a) the Court on a judicial review application is asked to consider material which post-dates the Tribunal Hearing: *WZATI v Minister for Immigration & Border Protection* [2015] FCA 923 ("WZATP") at [70] per Barker J; and
 - b) the materials appear to invite the Court to engage in impermissible merits review, contrary to the principles in *Wu Shan Liang*, CLR at 272 per Brennan CJ, Toohey, McHugh and Gummow JJ.
30. Admission of the above documents can only be for the purpose of inviting the Court to admit new evidence for the purpose of disagreeing with a factual conclusion reached by the Tribunal as opposed to bearing on some jurisdictional error: *SZJMG v Minister for Immigration & Citizenship* [2008] FCA 1145 at [27] per McKerracher J, and as such

the applicant mistakes the role the Court undertakes on judicial review, and effectively seeks to invite impermissible merits review contrary to the principles in *Wu Shan Liang*, CLR at 272 per Brennan CJ, Toohey, McHugh and Gummow JJ.

31. The documents are not relevant to the Court's task on the Judicial Review Application, and are, therefore inadmissible: *Evidence Act 1995* (Cth) ("*Evidence Act*"), s.56(2), and the Court will not therefore consider them as evidence in addressing the grounds of the Judicial Review Application.
32. For the sake of completeness the Court observes that the document related to the applicant's marital status in Finland entitled "Extract from the population information system in Finland", and which is annexed to the Applicant's Second Affidavit, and which shows the applicant's marital status as "Unknown" is also not a document which is admissible on the Judicial Review Application because it too seeks to quarrel with the Tribunal's factual findings. In any event, the document does not, as was asserted by the applicant in the Applicant's Second Affidavit at [3] mean "that there was no Legal marriage registered" to a woman who was resident in Finland at the time and with whom the applicant has a child. There is nothing on the face of the document which indicates that "Unknown" is intended to mean that there was no legal marriage registered, and in the absence of such an indication "Unknown" bears its ordinary meaning, which is "not known": The Shorter Oxford English Dictionary on Historical Principles (3rd Edn) (Oxford: Clarendon Press, 1992), page 2423.

Consideration – whether jurisdictional error

Jurisdictional error required

33. The Tribunal Decision may be liable to be set aside upon review if it involves jurisdictional error: *Plaintiff S157/2002 v The Commonwealth of Australia* [2003] HCA 2; (2003) 211 CLR 476; (2003) 77 ALJR 454; (2003) 195 ALR 24; (2003) 72 ALD 1 at [76] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ. Further, an error by the Tribunal, may constitute jurisdictional error if the Tribunal:
 - a) identifies a wrong issue;

- b) asks the wrong question;
- c) ignores relevant material; or
- d) relies on irrelevant material,

34. in a manner whereby the Tribunal's exercise or purported exercise of power is affected resulting in a decision exceeding or failing to exercise the authority or powers given under the *Migration Act: Minister for Immigration & Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323; (2001) 75 ALJR 1105; (2001) 180 ALR 1; (2001) 62 ALD 225 at [82] per McHugh, Gummow and Hayne JJ. In certain circumstances a denial of procedural fairness may also constitute jurisdictional error: *SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 152; (2006) 81 ALJR 515; (2006) 231 ALR 592; (2006) 93 ALD 300 ("*SZBEL*"). Legal unreasonableness may also give rise to jurisdictional error: *Minister for Immigration & Citizenship v Li & Anor* [2013] HCA 18; (2013) 249 CLR 332; (2013) 87 ALJR 618; (2013) 297 ALR 225; (2013) 138 ALD 181 ("*Li*") at [68] per Kiefel, Hayne and Bell JJ.

- 35. It is impermissible for this Court, sitting to hear the Judicial Review Application, to engage in merits review of the Tribunal Decision: *Wu Shan Liang*, CLR at 272 and 281-282 per Brennan CJ, Toohey, McHugh and Gummow JJ; *Zentai v O'Connor & Ors (No 3)* [2010] FCA 691; (2010) 187 FCR 495; (2010) 270 ALR 293; (2010) 116 ALD 476 at [367] per McKerracher J.
- 36. In the context of jurisdictional error occurring in relation to a partner visa application, issues generally arise from the Tribunal having failed to have regard to a relevant consideration. The Federal Court in *Sun v Minister for Immigration & Border Protection* [2017] FCA 1270; (2017) 157 ALD 437 ("*Sun*") observed that it was necessary for a Tribunal considering a partner visa of a class specified by reg.1.15A of the *Migration Regulations* to have regard to all of the circumstances of the alleged marital relationship by reference to those matters set out in reg.1.15A(3) of the *Migration Regulations*, and to such other matters as are raised by the materials before the Tribunal: *Sun* at [65]-[69] per Reeves J.

Ground 1 – failure to consider materials

37. Ground 1 asserts a failure by the Tribunal to consider “all the materials”.

38. The extent to which the Tribunal was required to consider material put before it is conditioned by reg.1.15A of the *Migration Regulations*. In *Singh v Minister for Immigration & Border Protection* [2017] FCA 1298; (2017) 159 ALD 442 at [38] per Charlesworth J the Federal Court said that:

The prescription in reg 1.15A of the matters to which the Tribunal must have regard is a prescription that affects the nature and limits of the decision-maker's functions or powers.

39. The Court is thus required to consider the prescription in reg.1.15A of the *Migration Regulations* when determining what material is relevant for consideration by the Tribunal. While reg.1.15A(3) of the *Migration Regulations* includes 15 criteria, and the Tribunal must have regard to each and every one, not all of the criteria will be central or fundamental to the decision to be made, and therefore it should not be inferred from a failure to mention a particular matter that that particular matter was not considered, but rather that it was not critical or fundamental to the decision to be made: *Minister for Immigration & Citizenship v Khadgi & Anor* [2010] FCAFC 145; (2010) 190 FCR 248; (2010) 274 ALR 438; (2010) 119 ALD 26 (“*Khadgi*”) at [62] per Stone, Foster and Nicholas JJ.

40. The Tribunal is required to assess the criteria in light of “all the circumstances”, which can include an assessment of the effect of subsequent acts or conduct upon the nature of the alleged relationship. In *Nduta v Minister for Immigration & Border Protection* [2016] FCA 1596 (“*Nduta*”) at [37] per Rares J the Federal Court stated that:

In a case such as the present, namely, the assessment of the nature of a relationship between human beings, subsequent acts or conduct are capable of revealing that what appeared to be an earlier state of affairs was not, in fact, in accordance with that appearance... Sometimes it is only when one looks at the subsequent conduct of a person that it can be seen that, earlier in the relationship, the person was not acting as he or she previously appeared to have been acting. Likewise here, the Tribunal was

entitled to consider subsequent events, under reg 1.15A(2)(c), because these sometimes can reveal that in a relationship said to be of love or affection, a party feigned his or her feelings or engaged in conduct for an ulterior purpose.

41. The assessment of whether the Tribunal has complied with the obligation to have regard to “all the circumstances” in reg.1.15A(3) of the *Migration Regulations* is a question of fact and degree to be assessed on the particular circumstances of the case: *Khadgi* at [70]-[71] per Stone, Foster and Nicholas JJ; *Sun* at [42] per Reeves J.
42. In the Tribunal Decision the Tribunal:
 - a) expressly acknowledged the matters set out in reg.1.15A(3)(a)-(d) of the *Migration Regulations* by using each subregulation as a heading in the Tribunal Decision: CB 279 at [12], 280 at [19] and [24], and 281 at [34];
 - b) referred to all the criteria under reg.1.15A(3)(a) of the *Migration Regulations* concerning financial aspects of the relationship, and noted there was little evidence of financial pooling, no jointly owned real estate or assets and no discernible consistent contribution to the household expenses: CB 279 at [15];
 - c) expressly referred to all the criteria under reg.1.15A(3)(b) of the *Migration Regulations* concerning the nature of the household and found the applicant and Ms Mohamed resided under the same roof and shared household responsibilities: CB 280 at [23];
 - d) addressed the criteria under reg.1.15A(3)(c) of the *Migration Regulations* concerning the social aspects of the relationship stating that at the time of their marriage and in the period following, the applicant and Ms Mohamed presented as a married couple and were considered to be a married couple by others, including their families, the Somali community and members of their Church, and accepted that others believed them to be in a genuine and committed relationship: CB 281 at [33];
 - e) referred to all the criteria under reg.1.15A(3)(d) of the *Migration Regulations* concerning the nature of the applicant’s and Ms Mohamed’s commitment to each other in extensive detail: see

CB 281-285 at [34]-[64], noting that many aspects of the relationship were genuine, but that others were “problematic”: CB 285 at [64]; and

f) at CB 285 at [64]-[66] found as follows:

64. ... Overall and having regard to the circumstances of this relationship, the Tribunal is not satisfied the applicant and sponsor have a mutual commitment to a shared life together as husband and wife to the exclusion of all others. The Tribunal is not satisfied the relationship is genuine and continuing.

65. Given these findings the Tribunal is not satisfied that at the time the visa application was made the parties were in a spousal relationship.

66. Therefore the applicant does not meet cl.820.211(2)(a).

43. The applicant raised his rights as a father to be with his child. The Court notes Australia is a signatory to the CROC.

44. When pressed on his claim that he wants to remain part of the child’s life where he has previously chosen not to be involved with his children’s lives, the applicant responded that he wished to do so because he knew this child was his. The Tribunal, however, noted at CB 285 at [62] that:

...the transcript of the proceeding of the restraining order hearing provided by the applicant indicate that he initially did not have contact with his child for about 9 months after separating from his wife. It indicates she did not refuse contact when contacted by the mediation centre, just saying that the applicant had not contacted her in nine months. The Tribunal notes the certificate from Centrecare provided by the applicant indicates they attended mediation in September 2016. The transcript indicates the applicant then started having regular contact in September 2016, after the delegate's decision. The Tribunal is not satisfied that the applicant's delay in having contact with his child in Australia is consistent with his earlier evidence as to him wanting to be involved in his son's life.

45. It can be inferred that the Tribunal may have been of the view the applicant had only begun engaging and contacting his child in an attempt to bolster his claims in the Combined Partner Visa application.

In the Court's view, the Tribunal has addressed the issue of the applicant being required to leave his son in Australia as a consequence of his not being granted a Combined Partner Visa, and in the circumstances and on the evidence the Tribunal's view was seemingly that the applicant himself had not consistently displayed an intention to remain involved in the child's life. For this reason the Court does not believe the Tribunal has committed a jurisdictional error in failing to take into account the rights or welfare of the child, if indeed that is a relevant consideration.

46. Insofar as the applicant referred to the *CROC*, and raised his rights as a father to be with his child, those submissions were raised in general terms and without particularisation. Ultimately, the real difficulty with the applicant's submission is that an international obligation un-enacted in Australian domestic law, such as that under the *CROC*, is not, in the absence of an express provision in the *Migration Act*, a mandatory relevant consideration which attracts judicial review on account of jurisdictional error: *Snedden v Minister for Justice & Anor* [2014] FCAFC 156; (2014) 230 FCR 82; (2014) 315 ALR 352; (2014) 145 ALD 273 at [147] per Middleton and Wigney JJ, and [242] per Pagone J; *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Lam* [2003] HCA 6; (2003) 214 CLR 1; (2003) 77 ALJR 699; (2003) 195 ALR 502; (2003) 72 ALD 613 at [101] per McHugh and Gummow JJ. There is no express provision in the *Migration Act* requiring the Court to have regard to the *CROC* as a mandatory relevant consideration in an application for judicial review, and the applicant's argument in relation to the *CROC* must fail.
47. The Tribunal had regard to each of the specified criteria in reg.1.15A of the *Migration Regulations* in determining whether or not the applicant was Ms Mohamed's spouse, and has taken into account the relevant circumstances falling outside of the specified criteria in reg.1.15A of the *Migration Regulations*. The Tribunal made all of the factual findings necessary to identify what all the circumstances of the relationship were when making a determination as to whether the applicant was Ms Mohamed's "spouse": *Sun* at [59]-[60] per Reeves J. In those circumstances, the Tribunal Decision was not affected by jurisdictional error by reason of a failure to take into account a relevant consideration or any relevant materials.

48. The Court finds there is no jurisdictional error in the Tribunal Decision established by ground 1.

Ground 2 – reliance on Ms Mohamed’s evidence

49. Ground 2 alleges the Tribunal irrelevantly considered and relied upon Ms Mohamed’s Statutory Declaration.

50. In Ms Mohamed’s Statutory Declaration she declared that:

- a) on 17 December 2015 she had witnessed a telephone conversation between the applicant and the Other Woman who identified herself as the applicant’s partner, and who resided in London in the UK;
- b) she subsequently personally contacted the Other Woman, who informed her of the relationship between her and the applicant, and of the existence of a three year old child of the relationship, and of the contact that she and the applicant had had since 2013;
- c) the Other Woman was unaware of the applicant’s marriage to Ms Mohamed in Australia or of his plans for permanent residence in Australia;
- d) the applicant had removed himself from Ms Mohamed’s residence on 18 December 2015, and she had had no contact with him since that time; and
- e) at no point during her marriage to the applicant had he notified her of the ongoing relationship with the Other Woman in London in the UK: CB 109.

51. On an application for review before the Tribunal, the evidence to be considered, and the weight to be attached to that evidence, is a matter for the Tribunal to determine, and not a matter with which this Court will generally interfere: *Lee v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 464 at [27]-[28] per French J; *Minister for Immigration & Multicultural Affairs v Indatissa* [2001] FCA 181; (2001) 64 ALD 1 at [32] per Sundberg, Emmett and Conti JJ; *Wu Shan Liang*, CLR at 272 per Brennan CJ, Toohey,

McHugh and Gummow JJ. In *Nduta* at [38] per Rares J the Federal Court observed that:

It was open to the Tribunal to consider the matters to which it referred, first, in forming a credibility-based finding about whether it accepted the appellant's evidence as to his commitment or state of mind in relation to being a spouse at the time of his application for the visa, and, secondly, in considering the allegations of subsequent events for the light they might have thrown on his actual state of mind or the actual state of the relationship at the time of that application.

52. The Tribunal discussed a number of concerns and inconsistencies in the applicant's evidence, including a failure to reveal the previous relationship with the Other Woman, and a child from that relationship: CB 284-285 at [51]-[58].
53. The Tribunal placed weight on Ms Mohamed's Statutory Declaration: CB 285 at [59], after raising a number of concerns regarding the credibility of the applicant's evidence, including referring to the transcript of proceedings in the Magistrates Court of Western Australia hearing conducted on 6 February 2017 where a number of statements in the transcript contradicted what the applicant had submitted to the Tribunal, including his statements as to his ongoing contact with his child from the relationship with Ms Mohamed.
54. The evidence of Ms Mohamed was therefore a critical consideration for the Tribunal to have regard to as it went to the criteria the Tribunal had to consider in determining the applicant's claim.
55. In *Re Minister for Immigration & Multicultural Affairs; Ex parte Holland* [2001] HCA 76; (2001) 185 ALR 504 ("*Re Holland*"), the High Court dealt with an alleged defacto relationship between an applicant and a Mr Holland, where Mr Holland remained legally married to his wife and had continuing obligations to the two children of his marriage to his wife, they having been married in 1978 according to the rights of the Islamic religion: *Re Holland* at [8] per Kirby J. In February 1992 the applicant and Mr Holland married before a religious officer of the Islamic faith, but that marriage was not lawful under Australian law, being polygamous: *Re Holland* at [11] per Kirby J. The Tribunal found that the applicant and Mr Holland were not legally

married: *Re Holland* at [12] per Kirby J. The question then became whether or not the applicant and Mr Holland had a mutual commitment to a shared life as husband and wife to the exclusion of all others, and whether they lived in a relationship which was genuine and continuing, although not legally married to each other: *Re Holland* at [13] per Kirby J. In that regard, the High Court in *Re Holland* at [16] per Kirby J observed that:

Modern relationships exist, including many Australian marriages of great strength and durability, which might not meet that criterion. However, on any view, the criterion of the Regulations is not concerned with the exclusion of all contact with other persons with whom there may have been an earlier marriage or relationship, or with the children of such a marriage or relationship, but with the mutual commitment of the persons concerned to a shared life with each other as a couple.

56. In *Re Holland* at [17] per Kirby J the High Court observed that the Tribunal had “regarded the evidence on exclusivity as conflicting”, but the Tribunal went on to find that the applicant had not satisfied the relevant definition of “spouse” in terms of its applicability to the relationship between the applicant and Mr Holland: *Re Holland* at [18] per Kirby J. The High Court would have granted an appeal on the merits, but because the matter was one involving judicial review requiring jurisdictional error, that was not a course open to the High Court: *Re Holland* at [24] per Kirby J. The High Court found that, on the evidence before the Tribunal, there was no error in the exercise of the Tribunal’s jurisdiction in concluding that there was not mutual commitment and exclusivity in the relationship between the applicant and Mr Holland, notwithstanding that the High Court thought that certain factual findings may have been wrong: *Re Holland* at [36] per Kirby J. *Re Holland* demonstrates the significant difficulty for the applicant in asserting that he considered the relationship was one of mutual commitment and exclusivity, when on the evidence before it, the Tribunal concluded otherwise. It is plain that on the evidence which was before the Tribunal that it was open to the Tribunal to make the finding that it did that the applicant and Ms Mohamed did not have a mutual commitment to a shared life together as husband and wife to the exclusion of all others.

57. Where a purported spouse who is the sponsor of an applicant gives evidence to the Tribunal that evidence is likely to be of significant importance in the Tribunal's determination as to whether a spousal relationship existed between the applicant and the sponsor, and it is likely to be an exceptional case where it can be said that a Tribunal fell into error by considering a sponsor's statement, and relying upon it, or giving it such weight as the Tribunal determined was necessary. Having regard to all of the circumstances, and in particular the evidence available for consideration by the Tribunal, it is apparent that this is not an exceptional case which would warrant the Tribunal disregarding Ms Mohamed's evidence, as contained in Ms Mohamed's Statutory Declaration.
58. In the above circumstances, no jurisdictional error in the Tribunal Decision is established by ground 2.

Ground 3 – fairness

59. Ground 3 asserts that the Tribunal failed to make a fair decision. Although unparticularised, the applicant was permitted to make both written and oral submissions in relation to this ground of review, a course consistent with a case decided after this case was argued, namely *DQQ17 v Minister for Immigration & Border Protection* [2018] FCA 784 at [9] per Colvin J, where the Federal Court held that it will be rarely appropriate to dismiss a ground of review in a migration case for lack of particularisation where a party is a litigant in person, and that a litigant in person ought to be given an opportunity to explain orally the matters with which they take issue: but compare *WZAVW v Minister for Immigration & Border Protection* [2016] FCA 760 ("*WZAVW*") at [35] per Gilmour J. The difficulty for the applicant was that nothing was put which might establish that the Tribunal Decision was unfair, either in relation to the procedure adopted on the review, or by reason of some form of legal unreasonableness. Mere disagreement with the Tribunal's findings of fact does not support a contention or claim the Tribunal committed a jurisdictional error: *El Saghir v Minister for Immigration & Border Protection* [2016] FCA 1430 at [25] per Flick J.
60. There is nothing in the materials to suggest that the applicant was denied procedural fairness or that the Tribunal failed to comply with

any of the requirements of Pt.7 Div.4 of the *Migration Act* in circumstances where:

- a) the applicant attended and gave evidence and presented arguments, and was provided with a real and meaningful opportunity to participate in the Tribunal Hearing process, and that process was not simply a “hollow shell or empty gesture”: *Mazhar v Minister for Immigration & Multicultural Affairs* [2000] FCA 1759; (2000) 183 ALR 188; (2000) 64 ALD 395 at [31] per Goldberg J; and
- b) an interpreter was present at the Tribunal Hearing, and, on the evidence before this Court, there is no evidence of inadequate interpretation: see [65]-[67] below.

61. The applicant asserts that the Tribunal failed to make a fair decision, but ultimately the applicant provided no explanation as to how, or why, the Tribunal Decision is unfair. The Court notes that:

- a) the applicant was asked to provide further information when his circumstances changed after he removed himself from Ms Mohamed’s residence: CB 128;
- b) the applicant was invited to appear before the Tribunal in accordance with s.360 of the *Migration Act*, and his migration agent provided submissions before and after the Tribunal Hearing;
- c) the Tribunal heard evidence from the two witnesses the applicant wished to call: CB 235 and 271, despite not being obliged to do so: *Migration Act*, s.361(3); and
- d) the Tribunal allowed the applicant an opportunity to consult with his migration agent when putting information to the applicant it stated would be the reason, or a part of the reason, for affirming the Delegate’s Decision *Migration Act*, s.359AA.

62. The Court considers ground 3 is no more than a plea for a different outcome more favourable to the applicant, and is thus a plea for impermissible merits review of the Tribunal Decision: *Wu Shan Liang*, CLR at 272 per Brennan CJ, Toohey, McHugh and Gummow JJ.

63. The Tribunal complied with the relevant statutory procedural requirements in relation to the Tribunal Hearing, and the Court finds no evidence the applicant was denied procedural fairness during the review process, if this is what is asserted in ground 3.
64. There is nothing in the Tribunal Decision which would indicate any legal unreasonableness in the terms arising from *Li*.
65. Ground 3 establishes no jurisdictional error in the Tribunal Decision.

Ground 4 – errors in interpretation

66. The Applicant's Second Affidavit asserted there were misunderstandings or errors in interpretation at the Tribunal Hearing. Specifically it was stated:

There was a misunderstanding of the mention of the UK child and partner where I thought the case assessor was talking about the child and partner in Finland. The only relationship I had was in Finland between me and Hodan. I had no relationship with anyone in the UK and I have no child in London. I have revisited the case in the green book and found this error to referred to by the Interview in the Administrative Appeals Tribunal.

67. The applicant provided no supporting affidavit evidence in the form of a transcript of the Tribunal Hearing to support his claim of errors in interpretation at the Tribunal Hearing. An error in interpretation may result in a jurisdictional error where:
 - a) the standard of interpretation is so inadequate that the applicant is effectively prevented from giving evidence; or
 - b) the errors in interpretation are material to adverse conclusions reached by the Tribunal: *SZRMQ* at [36] per Allsop CJ.
68. In relation to the standard of interpretation required at the Tribunal Hearing, and an assertion of error in relation to that interpretation, the Court makes the following observations and findings:
 - a) to amount to jurisdictional error the standard of interpretation at the Tribunal Hearing must have been so inadequate that it deprived the applicant of a real and meaningful opportunity to participate in the Tribunal Hearing, because the applicant was

effectively prevented from giving evidence and the conclusions formed on the basis of the inadequately interpreted evidence were material to the outcome of the applicant's Combined Partner Visa application: *SZRMQ* at [78] and [80] per Robertson J; *Perera v Minister for Immigration & Multicultural Affairs* [1999] FCA 507; (1999) 92 FCR 6; (1999) 56 ALD 231 at [26] per Kenny J;

- b) the applicant had an opportunity at the Tribunal Hearing to claim that there were errors in interpretation, but neither the applicant nor his migration agent did so, and it was not for the Tribunal to ensure that the applicant took the best advantage of the applicant's opportunity to be heard: *Sullivan v Department of Transport* (1978) 20 ALR 323; (1978) 1 ALD 383;
- c) it follows that the applicant was afforded procedural fairness by being given the opportunity to put evidence of any material misinterpretation before the Tribunal, but having been afforded that opportunity the applicant failed to put any evidence on the issue before the Tribunal, or before this Court, despite having filed two affidavits and, therefore, there is no evidence of any material misinterpretation affecting the Tribunal Decision;
- d) based upon the Tribunal Decision it appears the applicant answered the questions put by the Tribunal adequately and directly in relation to what was being asked of him, and, on the face of the Tribunal Decision there appears to be no issue with respect to any misinterpretation, and without evidence that the interpreter was not conveying to the Tribunal what was being said by the applicant (and vice versa), the Court cannot find any error, let alone jurisdictional error, in relation to the issue of interpretation; and
- e) there is nothing in the form of a transcript of the Tribunal Hearing before the Court that would enable it to determine if what the applicant alleges were misinterpretations or inadequate interpretations occurred, and, if they did occur, whether they were material to the outcome of the Tribunal Decision.

69. It follows from the above that ground 4 establishes no jurisdictional error in the Tribunal Decision.

Ground 5 – third party fraud by migration agent

70. Hypothetically, ground 5 might be taken to be an allegation of third party fraud on the Tribunal by the applicant's migration agent.
71. Fraudulent conduct by a third person may result in the Tribunal's jurisdiction being "constructively unexercised": *SZFNX v Minister for Immigration & Citizenship* [2007] FCA 1980 at [32] per Besanko J, summarising the effect of the judgment of the High Court of Australia in *SZFDE*. It must be shown that the migration agent acted fraudulently, that is, acted dishonestly, stultifying the proceedings before the Tribunal and disabling the Tribunal from discharging its statutory functions in relation to the review: *SZFDE* at [51] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ; *SZLIX* at [33] per Tamberlin, Finn and Dowsett JJ. Fraudulent conduct can be determined by inference from evidence but it must be the most probable inference from the facts as determined: suspicion is not enough: *SZLIX* at [23] per Tamberlin, Finn and Dowsett JJ. Mere negligence or incompetence or a simple failure to inform is insufficient to support jurisdictional error: *SZFDE* at [53] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ; *SZLIX* at [30] and [33] per Tamberlin, Finn and Dowsett JJ.
72. Where an applicant alleges fraud against a third party vitiating the Tribunal's decision-making process an applicant must have an opportunity to go into the witness box to give evidence, with the knowledge of the issues needed to be addressed: *SZRUR v Minister for Immigration & Border Protection & Anor* [2013] FCAFC 146; (2013) 216 FCR 445; (2013) 305 ALR 557; (2013) 138 ALD 46 at [39]-[40] per Robertson J, [53] per Allsop CJ and [59]-[60] per Mortimer J. The level of satisfaction required in cases where fraud is alleged is that which was required in *Briginshaw v Briginshaw & Anor* (1938) 60 CLR 336; [1938] ALR 334; (1938) 12 ALJ 100 ("*Briginshaw*"), CLR at 363 and 368 per Dixon J; *SZLIX* at [33] per Tamberlin, Finn and Dowsett JJ. The *Briginshaw* standard is now codified in s.140 of the *Evidence Act: Commonwealth & Anor v Fernando* [2012] FCAFC 18; (2012) 200 FCR 1; (2012) 287 ALR 267; (2012) 126 ALD 10 at [128] per Gray, Rares and Tracey JJ.

73. The applicant's oral submissions did not however allege fraud by the applicant's migration agent on the Tribunal. What was alleged, specifically, by the applicant was that the migration agent was "incompetent": Transcript, page 5, which was manifested by:
- a) a failure by the migration agent to indicate what type of proof the applicant should have provided to the Tribunal: Transcript, page 5; and
 - b) that the migration agent did not talk in front of the Tribunal: Transcript, page 5, and "was like a spectator" who "didn't do that much of anything": Transcript, page 9.
74. In this case there is nothing in the applicant's submissions which alleges actual fraudulent conduct on the part of the migration agent, and a simple failure to inform is, as set out above, insufficient to support jurisdictional error, as is mere negligence or incompetence, and even if the migration agent's conduct in this case rises above a simple failure to inform to the level of mere negligence or incompetence, no jurisdictional error is thereby established: see [70] above. In those circumstances the Court considered it unnecessary to put the applicant into the witness box, because no fraud on the Tribunal was actually alleged.
75. In the above circumstances, ground 5 does not establish jurisdictional error in the Tribunal Decision.

A plea for impermissible merits review

76. Most of the oral submissions made at hearing sought to invite the Court to engage in impermissible merits review: *Wu Shan Liang*. The applicant appeared to have assumed this Court could grant him the Combined Partner Visa, which it cannot do. While the applicant appealed to the Court to contact those who will support him, or to tell him what evidence he needs, that is not the duty or role of the Court, nor was it the duty or role of the Tribunal, to make inquiries or establish a case for the applicant: *Minister for Immigration & Multicultural & Indigenous Affairs v SGLB* [2004] HCA 32; (2004) 78 ALJR 992; (2004) 207 ALR 12; (2004) 78 ALD 224 at [43] per Gleeson CJ; *Minister for Immigration & Citizenship v SZNVW* [2010] FCAFC 41; (2010) 183 FCR 575; (2010) 114 ALD 666 at [36] per

Keane CJ and [49] per Emmett J, and there is no jurisdictional error in the Tribunal failing to do so, save where there are obvious inquiries to be made about a critical fact the existence of which is easily ascertained: *Minister for Immigration & Citizenship v SZIAI* [2009] HCA 39; (2009) 83 ALJR 1123; (2009) 259 ALR 429; (2009) 111 ALD 15 (“*SZIAI*”) at [25] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ. This is not a case which fits within the qualification arising from *SZIAI*.

Conclusion and orders

77. The Court has concluded that the Tribunal Decision is unaffected by jurisdictional error. It follows that there must be an order dismissing the Judicial Review Application.

78. The Court will hear the parties as to costs.

I certify that the preceding seventy-seven (77) paragraphs are a true copy of the reasons for judgment of Judge Antoni Lucev

Associate:

Date: 12 June 2019